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No. 07-586

In the Supreme Court of the United States

ROBERT S. CUILLO, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly upheld the district court's determination that a particular document fell within the crime-fraud exception to the tax-practitioner privilege.

2. Whether the court of appeals correctly held that the tax-shelter exception to the tax-practitioner privilege, as it was codified at 26 U.S.C. 7525(b) (2000), was not limited to communications relating to corporate taxes.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-50a) is reported at 492 F.3d 806. The opinions of the district court (Pet. App. 51a-59a, 60a-72a, 73a-111a) are reported at 95 A.F.T.R.2d 2005-1725 (RIA), 95 A.F.T.R.2d 2005-2835 (RIA), and 96 A.F.T.R.2d 2005-6318 (RIA).

JURISDICTION

The judgment of the court of appeals was entered on July 2, 2007. On September 27, 2007, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including October 31, 2007, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case arises out of an action to enforce administrative summonses issued by the Internal Revenue Service (IRS) to BDO Seidman, LLP, a public accounting and consulting firm. At the time the summonses were issued, Section 6111(a) of the Internal Revenue Code (26 U.S.C.) required the organizers of certain tax shelters to register the shelters with the IRS. Any tax shelter that was required to be registered under Section 6111(a) was deemed to be "potentially abusive," as was any "arrangement which [was] of a type which the Secretary determine[d] by regulations as having a potential for tax avoidance or evasion." 26 U.S.C. 6112(b)(2) (2000).[1] The organizers and sellers of "potentially abusive" tax shelters also were required to maintain a list of the investors in such shelters and to make those lists available to the IRS upon request. A failure to comply with the registration and listing requirements of Sections 6111 and 6112 could result in monetary penalties. See 26 U.S.C. 6707, 6708 (2000).

2. In September 2000, the IRS received information suggesting that BDO Seidman was promoting potentially abusive tax shelters without complying with the registration and list-keeping requirements for organizers and sellers of such tax shelters. On May 2, 2002, pursuant to 26 U.S.C. 7602, the IRS issued 20 sum-

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[1] Sections 6111 and 6112 were amended by the American Jobs Creation Act of 2004, Pub. L. No. 108-357, § 815, 118 Stat. 1581-1583. The Act replaced the terms "tax shelter" in Section 6111 and "potentially abusive tax shelter" in Section 6112 with the term "reportable transaction." Reportable transactions are defined as transactions "of a type which the Secretary determines as having a potential for tax avoidance or evasion." 26 U.S.C. 6707A(c)(1) (Supp. IV 2004).

monses to BDO Seidman commanding production of documents and testimony relating to various potentially abusive tax shelters organized or sold by BDO Seidman, as well as information about clients of BDO Seidman who had invested in those tax shelters. BDO Seidman failed to produce the documents as required by the summonses. Gov't C.A. Br. 5.

On July 9, 2002, the government petitioned the district court for enforcement of the summonses pursuant to 26 U.S.C. 7402(b), 7604(a). BDO Seidman opposed enforcement on the grounds that the investigation lacked a legitimate purpose, the summonses were overbroad and issued in bad faith, and the information sought was already in the possession of the IRS and was not relevant to its investigation. The district court rejected those arguments and ordered BDO Seidman to produce all documents responsive to the summonses, except for documents the firm had listed on two privilege logs and submitted to the court for *in camera* review. Pet. App. 76a-77a; Gov't C.A. Br. 5-6.

Some of the responsive documents revealed the identities of clients of BDO Seidman who had invested in tax shelters. Two groups of those clients sought to intervene in the litigation, contending that their identities were protected from disclosure under 26 U.S.C. 7525, which creates a confidentiality privilege for certain communications between federally authorized tax practitioners and their clients. The district court held that information regarding a client's identity is outside the scope of the statutory privilege and denied the motions to intervene. After remanding the case to the district court for further findings, the court of appeals affirmed the denial of intervention. 337 F.3d 802 (2003). This Court denied the intervenors' petition for a writ of certiorari.

540 U.S. 1178 (2004). Pet. App. 77a-82a; Gov't C.A. Br. 6-7.

3. The district court then allowed the clients of BDO Seidman to intervene in their own names to assert objections to the firm's disclosure of documents responsive to the summonses. Pet. App. 83a. The intervenors asserted that 267 responsive documents were protected from disclosure by the tax-practitioner privilege at 26 U.S.C. 7525, the attorney-client privilege, and/or the work product doctrine; the intervenors submitted copies of those documents to the district court for *in camera* review. Pet. App. 74a-75a. The government argued, among other things, that the intervenors' privilege claims were defeated by two applicable exceptions, namely the common law crime-fraud exception and the statutory tax-shelter exception to the tax-practitioner privilege, 26 U.S.C. 7525(b) (2000). Gov't C.A. Br. 16-17. In support of its arguments, the government submitted a declaration of Revenue Agent Sandra Alvelo and additional exhibits. Pet. App. 94a.

On March 30, 2005, the district court ruled on the intervenors' privilege claims. Pet. App. 73a-111a. The court noted that it had reviewed the 267 documents *in camera*. *Id.* at 76a. The court determined that the documents "appear[ed] to fall within either the attorney-client, tax practitioner and/or work product privileges." *Id.* at 90a. In a footnote, the district court ruled that it could not conclude "at this stage in the litigation" that BDO Seidman and the intervenors were engaged in "tax shelters, as defined under [26 U.S.C. 6662(d)(2)(C)(ii) (Supp. IV 2004)]" and thus could not find that the statutory tax-shelter exception to the tax-practitioner privilege at 26 U.S.C. 7525(b) (2000) applied. Pet. App. 95a n.6.

The district court rejected the government's argument that the crime-fraud exception should be applied "as a blanket matter" to all 267 documents. Pet. App. 94a-95a. Instead, the district court reviewed the documents *in camera* to determine, "on a document-by-document basis," whether any individual documents fell within the crime-fraud exception. *Id.* at 95a-96a. The court stated that in conducting the *in camera* review, it would make "its own independent determination as to whether there [was] sufficient evidence to show * * * '(1) a *prima facie* showing of [a crime or] fraud, and (2) [that] the communications in question are in furtherance of the misconduct.'" *Id.* at 97a (second pair of brackets in original) (quoting *Vardon Golf Co.* v. *Karsten Mfg. Corp.*, 213 F.R.D. 528, 535 (N.D. Ill. 2003)).

The district court identified three recent cases in which federal courts had "attempt[ed] to address whether transactions produced and marketed by accounting, consulting and law firms were abusive tax shelters in violation[] of the tax code." Pet. App. 97a.[2] The district court viewed those cases as "a background from which the court [could] draw to identify potential indicators of fraud that could lead to a finding of [a] *prima facie* showing of a crime-fraud and communication in furtherance of the crime-fraud." *Ibid.* The district court identified eight "potential indicators of fraud" that would guide its determination of "whether the government can meet the *prima facie* test [for application

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[2] The three cases were *Denney* v. *Jenkens & Gilchrist*, 340 F. Supp. 2d 338 (S.D.N.Y. 2004), rev'd in part and vacated in part *sub nom. Denney* v. *BDO Seidman, LLP*, 412 F.3d 58 (2d Cir. 2005); *Miron* v. *BDO Seidman, LLP*, 342 F. Supp. 2d 324 (E.D. Pa. 2004); and *United States* v. *KPMG*, 316 F. Supp. 2d 30 (D.D.C. 2004).

of the crime-fraud exception] on an individual document-by-document basis":

> (1) the marketing of pre-packaged transactions by BDO; (2) the communication by the Intervenors to BDO with the purpose of engaging in a pre-arranged transaction developed by BDO or [a] third party with the sole purpose of reducing taxable income; (3) BDO and/or the Intervenors attempting to conceal the true nature of the transaction; (4) knowledge by BDO, or a situation where BDO should have known, that the Intervenors lacked a legitimate business purpose for entering into the transaction; (5) vaguely worded consulting agreements; (6) failure by BDO to provide services under the consulting agreement yet receipt of payment; (7) mention of the COBRA [Currency Options Bring Reward Alternatives] transaction; and (8) use of boiler-plate documents.

Id. at 102a-103a. The district court emphasized that it would not "limit itself to the indicators" in assessing whether a "*prima facie* case for the application of the crime-fraud exception" was presented, and that "an indication of potential fraud does not mean that fraud exists sufficient for a *prima facie* finding." *Id.* at 103a-104a. The court instead would consider the "totality of the circumstances" surrounding each document. *Id.* at 103a.

Following its *in camera* review, the district court concluded that "a *prima facie* case for the crime-fraud exception" had been established with respect to only one of the 267 documents, Document A-40. Pet. App. 104a, 114a-117a. That document is a December 19, 2001, electronic mail exchange among employees of BDO Seidman. The district court indicated that it was "specifically concerned" with the following statement in the ex-

change, which was authored by BDO Seidman employee Michael Kerekes (Kerekes): "I expect that Larry and I will provide Jay a list of losses to be triggered so we can make sure each client gets what he wants." *Id.* at 104a, 114a.

Pursuant to *United States* v. *Davis*, 1 F.3d 606 (7th Cir. 1993), cert. denied, 510 U.S. 1176 (1994), the district court required the intervenors "to provide an explanation as to why [Document A-40] should not be disclosed to the government under the crime-fraud exception." Pet. App. 104a-105a. The intervenors filed a memorandum in which they asserted that Document A-40 reflected an effort by BDO Seidman employees to accomplish their clients' "year end tax planning goals" with respect to "distressed" debt instruments in which the clients had invested. Gov't C.A. Combined Br. 8. The intervenors' submission included several articles concerning year-end tax planning and declarations from the BDO Seidman employees involved in the electronic mail exchange, Kerekes and Robert Greisman. *Id.* at 9.

The government filed a response that included a supplemental declaration executed by Revenue Agent Alvelo with supporting documents that had been produced by BDO Seidman. Gov't C.A. Combined Br. 9-10. The documents described the types of tax-shelter transactions at issue, one of which involved the transfer of a portfolio of "distressed" debt instruments (meaning debt instruments with a high basis but a low market value) from a foreign party to a domestic limited liability company taxed as a partnership, in exchange for a controlling interest in the partnership. Under 26 U.S.C 723, the partnership would retain the foreign party's high basis in the debt instruments. The foreign party then would sell all or almost all of its interest in the partner-

ship to a domestic taxpayer at a price substantially less than the partnership's basis in the distressed debt. Under 26 U.S.C. 743(a) (2000), the partnership's basis in the distressed debt would not change. When the distressed debt instruments were sold or exchanged (sometimes by lower-tier partnerships to which they had been contributed), the domestic taxpayer would realize the built-in loss from the transaction. Alvelo Fifth Supp. Decl. ¶¶ 53-63.[3] The Cuillo transaction described in Agent Alvelo's declaration was of this type, and the realized loss exceeded $20 million. *Id.* ¶¶ 58, 63. Through a "Consulting Agreement," Cuillo contracted to pay BDO Seidman $1.47 million for the tax-shelter product. *Id.* ¶ 55.

The documents also revealed BDO Seidman's worries about the need to obtain the protection of the attorney-client and tax-practitioner privileges for itself and its clients. Gov't C.A. Combined Br. 10. In one electronic mail message sent on April 27, 2001, Kerekes wrote that if BDO Seidman had an "argument" that the accountant-client privilege would extend to Helios (another entity involved in some of BDO Seidman's tax-shelter transactions)—which Kerekes acknowledged was "something of a long shot"—Kerekes "wouldn't mind litigating it for a couple of years while statutes [of limitations] run." Alvelo Fifth Supp. Decl. ¶ 39. The government's submission also demonstrated that the intervenors had purchased distressed-debt "investments" near the end of the year and had disposed of their "investments" shortly thereafter, in order to generate a capital loss in the same year of the investment. Gov't C.A. Combined Br.

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[3] See Internal Revenue Service, *Coordinated Issue Paper—Distressed Asset/Debt Tax Shelters*, 2007 WL 1511543 (Apr. 18, 2007).

10. The government also directed the district court to a May 2, 2001, memorandum drafted by Kerekes, in which Kerekes indicated that if the distressed debt packages at issue were "subject to the 'marking-to-market rules'" under the Internal Revenue Code, that "would of course render [them] useless for our purposes." *Id.* at 10-11.[4]

On May 17, 2005, the district court ruled that the intervenors had "failed to provide [a] sufficient explanation to rebut this court's finding of a *prima facie* case for the application of the crime-fraud exception for [D]ocument A-40." Pet. App. 60a-61a. Based on Agent Alvelo's declaration and the supporting materials submitted by the government, the district court found that "the immediate activity in [the] transaction was for [intervenor Cuillo] to obtain a loss." *Id.* at 69a. The district court noted that Cuillo's initial investment in the distressed debt had occurred in late 2001, "the same period in which [Cuillo] was looking to receive the loss." *Ibid.* The court found that the timing of the investment "contradict[ed]" the intervenors' "claim that their primary purpose for investing in these transactions was the hope of making a profit." *Ibid.* The court also found that the May 2, 2001, memorandum drafted by Kerekes—in which Kerekes indicated that a "marking-to-market requirement" would render the distressed debt

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[4] The district court subsequently explained that "[m]arking a security to market value requires the revaluing of the security from its book value to fair market value" and that the "effect of the 'marking-to-market' on 'distressed debt' would mean the elimination of a potential deductible tax loss." Pet. App. 69a-70a. As noted *supra*, an essential component of the distressed debt transactions at issue was the transfer to the domestic partnership of the foreign party's high tax basis in the underlying debt instruments; the high basis ultimately enabled the domestic taxpayer to claim a large tax loss when the instruments were sold or exchanged.

packages "useless for our purposes"—further supported the conclusion that "the sole motive [of the transactions at issue] was to obtain a loss." *Id.* at 70a-71a. The district court noted that the May 2, 2001, memorandum was the first document it had viewed that suggested that the transactions at issue had the "sole purpose" of obtaining a loss. *Id.* at 71a. Moreover, the court concluded that the intervenors had "failed to provide any explanation in their briefs or supporting documentation to overcome the government's position that this particular transaction is in violation of the Internal Revenue Code." *Id.* at 70a. Accordingly, the court concluded that "the crime-fraud exception must be applied to [D]ocument A-40 and therefore a claim of privilege cannot be used to prevent the disclosure of [D]ocument A-40 to the IRS under the IRS's civil subpoenas." *Id.* at 72a.

4. The intervenors filed a motion under Federal Rule of Civil Procedure 60(b) for relief from the district court's May 17, 2005, order. Pet. App. 51a. The intervenors informed the court that the Second Circuit had reversed the judgment in *Denney* v. *Jenkens & Gilchrist*, 340 F. Supp. 2d 338 (S.D.N.Y. 2004), rev'd in part and vacated in part *sub nom. Denney* v. *BDO Seidman, LLP*, 412 F.3d 58 (2d Cir. 2005). Because the district court had relied in part on the district court's opinion in *Denney*, the intervenors asked the court to reexamine its ruling on Document A-40. Pet. App. 53a. The district court denied the motion, noting that the court "did not rely on the Southern District of New York's *Denney* decision as controlling case law in either the March 30th or May 17th opinions." *Id.* at 53a-54a.

5. The IRS appealed from the district court's determination that the documents for which the intervenors claimed privilege were protected by the statutory tax-

practitioner privilege, 26 U.S.C. 7525 (2000).[5] The intervenors cross-appealed from the district court's finding that Document A-40 fell within the crime-fraud exception. Pet. App. 2a.

With respect to Document A-40, the Seventh Circuit ruled that "the district court did not abuse its discretion when it concluded that the IRS had made a prima facie showing of crime or fraud which the Intervenors failed to explain satisfactorily." Pet. App. 29a. The court of appeals noted that in the Seventh Circuit, the party seeking to invoke the crime-fraud exception "must present prima facie evidence that 'gives colour to the charge' by showing 'some foundation in fact.'" *Id.* at 25a (quoting *United States* v. *Al-Shahin*, 474 F.3d 941, 946 (7th Cir. 2007), and *Clark* v. *United States*, 289 U.S. 1, 15 (1933) (internal quotation marks omitted)). The court explained that a party meets that initial burden by "bringing forth sufficient evidence to justify the district court in requiring the proponent of the privilege to come forward with an explanation for the evidence offered against it." *Ibid.* (citing *Davis*, 1 F.3d at 609). The privilege remains "if the district court finds [the] explanation satisfactory." *Ibid.*

The court of appeals rejected the argument that the party asserting the crime-fraud exception must "make out a prima facie case of each element of a particular crime or common law fraud." Pet. App. 25a. The court stated that such an approach "reflect[ed] the view of some circuits, which require enough evidence of crime or fraud to support a verdict in order to invoke the crime-

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[5] The IRS also appealed from the district court's ruling sustaining BDO Seidman's claim of attorney-client privilege with respect to a memorandum written by one of BDO's employees. Pet. App. 2a. That issue is not raised in the petition.

fraud exception." *Ibid.* The court noted that the Seventh Circuit instead required "that the party seeking to abrogate the privilege need only 'give colour to the charge' by showing 'some foundation in fact.'" *Ibid.* (citations omitted). The court of appeals concluded that the district court had acted within its discretion when it found that the IRS had made a *prima facie* showing that Document A-40 was a communication made in furtherance of a crime or fraud and, after offering the intervenors the opportunity to explain the communication, rejected the explanation as not satisfactory. *Id.* at 29a.

With respect to the applicability of the tax-practitioner privilege of 26 U.S.C. 7525(a)(1) (2000),[6] and in particular the scope of the then-applicable tax-shelter exception to the privilege codified at 26 U.S.C. 7525(b) (2000),[7] the court of appeals held that the opponent of

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[6] Section 7525(a)(1) provides:

> With respect to tax advice, the same common law protections of confidentiality which apply to a communication between a taxpayer and an attorney shall also apply to a communication between a taxpayer and any federally authorized tax practitioner to the extent the communication would be considered a privileged communication if it were between a taxpayer and an attorney.

26 U.S.C. 7525(a)(1) (2000).

[7] The tax-shelter exception provided:

> The privilege under subsection (a) shall not apply to any written communication between a federally authorized tax practitioner and a director, shareholder, officer, or employee, agent, or representative of a corporation in connection with the promotion of the direct or indirect participation of such corporation in any tax shelter (as defined in Section 6662(d)(2)(C)(iii)).

26 U.S.C. 7525(b) (2000).

the privilege—here, the IRS—bears the burden of establishing that a communication falls within the exception. Pet. App. 31a-35a. The court then rejected the intervenors' argument that the tax-shelter exception "applie[d] only to tax shelters that shelter corporate taxes." *Id.* at 36a. The court explained that "[t]he plain text appears to apply to any tax shelter falling within the definition of a tax shelter found at 26 U.S.C. § 6662(d)(2)(C)(ii)." *Id.* at 36a-37a.

The court of appeals rejected the intervenors' argument that subsection (b)'s heading—which read at that time, "[s]ection not to apply to communications regarding corporate tax shelters"—demonstrated a congressional intent to limit the scope of the exception to tax shelters for corporate income taxes. The court observed that "[a]s a general rule, [t]he title of a statute . . . cannot limit the plain meaning of the text." Pet. App. 37a (internal quotation marks and citations omitted). The court then concluded that "subsection (b) is not ambigu-

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In 2004, Section 7525(b) was amended in several respects. The heading of the subsection (which formerly read, "Section not to apply to communications regarding corporate tax shelters") now reads, "Section not to apply to communications regarding tax shelters." American Jobs Creation Act of 2004, Pub. L. No. 108-357, § 813(a), 118 Stat. 1581. That change was effective for communications made after October 22, 2004. In addition, the 2004 amendments substituted the word "person" for "corporation" in the text of the subsection and thus eliminated any requirement that a corporation be involved in the written communications covered by the tax-shelter exception. *Ibid.* Third, because the definition of "tax shelter" found at 26 U.S.C. 6662(d)(2)(C)(iii) (2000) was moved to 26 U.S.C. 6662(d)(2)(C)(ii) (Supp. IV 2004), § 812(d), 118 Stat. 1580, a corresponding change was made to Section 7525(b), § 813(a), 118 Stat. 1581. For ease of reference, the court of appeals referred to the more recent Code section containing the "tax shelter" definition (Pet. App. 36a n.13). This brief does likewise.

ous. If anything, the heading adds ambiguity to subsection (b). Absent this heading, the subsection would not seem limited to corporate tax shelters at all." *Ibid.*

The court of appeals also noted that, although the heading relied upon by the intervenors "suggests that Congress had corporate tax shelters in mind, 'the fact that a statute can be applied in situations not expressly anticipated by Congress' demonstrates breadth, not ambiguity." Pet. App. 38a (citations omitted). The court emphasized the breadth of the language of the tax-shelter exception, noting that it applied to "*any* written communication . . . in connection with the promotion of the direct or indirect participation of such corporation in *any* tax shelter." *Ibid.* The court also noted that Congress elected to refer to the "relatively broad" definition of "tax shelter" found at 26 U.S.C. 6662(d)(2)(C)(ii) (Supp. IV 2004),[8] rather than to the narrower definitions in the pre-2004 version of 26 U.S.C. 6111 (2000). *Ibid.* The court further concluded that the legislative history on which the intervenors relied "raise[d] more questions than it answers." *Id.* at 39a. And the court rejected the intervenors' claim that application of the tax-shelter exception to tax shelters that do not involve corporate income taxes would destroy the privilege any time a corporation participates in any way in a tax shelter. *Id.* at 45a. The court emphasized that the exception was limited by its terms to written communications between a federally authorized tax practitioner and particular corporate agents, and that the written communication must "relate[] to the corporation's direct or indirect participa-

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[8] That definition includes "any partnership, entity, plan or arrangement, a significant purpose of which is the avoidance or evasion of Federal income tax." Pet. App. 38a (quoting 26 U.S.C. 6662(d)(2)(C)(ii) (Supp. IV 2004)).

tion in a particular type of tax shelter, i.e., one meeting the definition found in § 6662(d)(2)(C)(ii)." *Ibid.*

Because the district court failed to make clear what legal standard it had applied in determining that the tax-shelter exception was inapplicable, the court of appeals vacated the district court's ruling on the tax-shelter exception and remanded for further consideration. Pet. App. 48a-49a. The court directed the district court on remand (1) to determine, for each of the 266 documents at issue, whether the attorney-client privilege, the tax-practitioner privilege, or both privileges, applied; and (2) for documents protected by the tax-practitioner privilege only, to permit the IRS to attempt to demonstrate the applicability of the tax-shelter exception. *Id.* at 49a.

ARGUMENT

Petitioners seek review of the court of appeals' factbound ruling upholding the district court's application of the crime-fraud exception to a single document. Further review of that ruling is unwarranted. Although the courts of appeals have articulated somewhat different verbal formulations of the evidentiary showing required to overcome a claim of privilege under the crime-fraud exception, the differences in wording do not warrant this Court's intervention. Under any of the formulations, the determination of whether the crime-fraud exception applies is highly fact-based; as a result, there is no basis on which to conclude that the circuits' varying formulations create a true conflict by yielding different results on equivalent facts. Review of that question is particularly unwarranted in this case, where only a single document is at issue and where the record before the

district court would satisfy the crime-fraud exception under any articulation of the evidentiary standard.

Petitioners also seek review of the court of appeals' determination that the pre-2004 version of the tax-shelter exception to the statutory tax-practitioner privilege was not limited to tax shelters designed to evade the payment of *corporate* income tax. Further review of that narrow issue is unwarranted. The court's decision is correct, it relies on longstanding precedent of this Court, petitioners identify no conflict among the circuits, and the issue is of limited and diminishing significance in light of the 2004 amendment to the statute, which eliminated the language on which petitioners rely.

1. Petitioners contend (Pet. 7-27) that the court of appeals erred in using a "totality of the circumstances" standard to determine whether the requirements of the crime-fraud exception had been satisfied, and that the circuits are meaningfully divided over the question of the proper evidentiary standard that should govern that question. Petitioners' contentions are without merit.

a. Like other privileges or immunities, the attorney-client privilege stands in derogation of the public's "right to every man's evidence," 8 John H. Wigmore, *Evidence* § 2192, at 70 (1961) (Wigmore), and as "an obstacle to the investigation of the truth." *Id.* § 2291, at 554. Accordingly, the privilege "ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle." *Ibid.*; see *United States* v. *Zolin*, 491 U.S. 554, 562 (1989) ("[s]ince the privilege has the effect of withholding relevant information from the factfinder, it applies only where necessary to achieve its purpose") (quoting *Fisher* v. *United States*, 425 U.S. 391, 403 (1976)); *University of Pa.* v. *EEOC*, 493 U.S.

182, 189 (1990) (privileges that obstruct the truth-finding process must be construed narrowly).

When a client, intending to violate basic legal obligations, consults an attorney in furtherance of those intentions, there is less societal interest in protecting the communication. The attorney-client privilege accordingly does not extend to advice in aid of future wrongdoing. 8 Wigmore § 2298, at 573. In particular, the privilege does not apply to a communication where a client "uses the lawyer's advice or other services to engage in or assist a crime or fraud." Restatement (Third) of the Law Governing Lawyers § 82(b) at 614 (2000); see Supreme Court Standard 503(d)(1) (1972), in 56 F.R.D. 184, 236 (1973) (there is no privilege "[i]f the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud");[9] *In re Green Grand Jury Proceedings*, 492 F.3d 976, 980 (8th Cir. 2007) ("Although there is a societal interest in enabling clients to get sound legal advice, there is no such interest when the communications or advice are intended to further the commission of a crime or fraud.") (quoting *In re Richard Roe, Inc.*, 68 F.3d 38, 40 (2d Cir. 1995)); *In re Antitrust Grand Jury*, 805 F.2d 155, 162 (6th Cir. 1986) ("All reasons for the attorney-client privilege are completely eviscerated when a client consults an attorney not for advice on past misconduct, but for legal assistance in carrying out a contemplated or ongoing crime or fraud.").

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[9] Although Supreme Court Standard 503 was not enacted by Congress, it is "an excellent distillation of the principles governing application of the privilege." 3 Joseph M. McLaughlin, *Weinstein's Federal Evidence* 503-1 (2d ed. 1997).

This Court addressed the crime-fraud exception in *Clark* v. *United States*, 289 U.S. 1 (1933). *Clark* involved a juror who was convicted of criminal contempt based on misleading and false answers that the juror provided during voir dire concerning her qualifications to serve. The issue before the Court was whether the admission of testimony concerning the juror's conduct during deliberations was "a denial or impairment of any lawful privilege." *Id.* at 12. Assuming the existence of a privilege protecting jury deliberations, the Court concluded that "the privilege does not apply where the relation giving birth to it has been fraudulently begun or fraudulently continued." *Id.* at 14. The Court analogized the situation before it to the crime-fraud exception to the attorney-client privilege:

> There is a privilege protecting communications between attorney and client. The privilege takes flight if the relation is abused. A client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law. He must let the truth be told. * * * It is obvious that it would be absurd to say that the privilege could be got rid of merely by making a charge of fraud. To drive the privilege away, there must be something to give colour to the charge; there must be *prima facie* evidence that it has some foundation in fact. When that evidence is supplied, the seal of secrecy is broken.

Id. at 15 (internal quotation marks and citations omitted).

b. The court below drew its standard for the crime-fraud exception directly from *Clark*. In *In re Feldberg*, 862 F.2d 622 (7th Cir. 1988), the court of appeals held

that "[t]o drive the privilege away, there must be something to give colour to the charge [of fraud or criminality]; there must be *prima facie* evidence that it has some foundation in fact." *Id.* at 625 (citations and internal quotation marks omitted). When such a *prima facie* showing is made, the adverse party—"the one with superior access to the evidence and in the best position to explain things"—is required "to come forward with that explanation." *Id.* at 625-626.[10] And "[i]f the court finds the explanation satisfactory, the privilege remains." *Id.* at 626. Accord, *Al-Shahin*, 474 F.3d at 946-947; *Davis*, 1 F.3d at 609. This Court has previously declined to review the standard employed by the court of appeals. See *Davis* v. *United States*, 510 U.S. 1176 (1994) (No. 93-900). The same result is appropriate here.

Although petitioners assert (Pet. 11) that the court of appeals' standard permits district courts to "apply[] an *ipse dixit* standard with no need to identify anything more than suspicions about unidentified wrongs," case law does not support petitioners' dire characterization. Indeed, petitioners concede (Pet. 23) that in *Al-Shahin*, *supra*, the court of appeals "took pains to cite the extensive independent evidence of the identified mail fraud" that supported application of the crime-fraud exception in that case. See *Al-Shahin*, 474 F.3d at 946-947. Petitioners similarly acknowledge (Pet. 23) that in *Feldberg*, the court also "took pains" to "point to ample independent evidence" of obstruction of justice as a basis for pos-

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[10] The Seventh Circuit analogized the "*prima facie* case" requirement in the setting of the crime-fraud exception to the role of a "*prima facie* case" in discrimination cases. *Feldberg*, 862 F.3d at 626 (citing *Texas Dep't of Cmty. Affairs* v. *Burdine*, 450 U.S. 248, 254 n.7 (1981)).

sible application of the crime-fraud exception in that case. See *Feldberg*, 862 F.2d at 625.

The same is true in this case. Petitioners' abstract concerns about the court of appeals' standard do not justify review, because the ruling on the crime-fraud exception as applied to Document A-40 was not based on mere "suspicions about unidentified wrongs" (Pet. 11). The district court rendered its ruling only after receiving lengthy evidentiary submissions by the parties on the question whether Document A-40 was a communication made in furtherance of a crime or fraud. In its ruling, the district court made clear that it had been presented with independent evidence demonstrating that the "sole motive" of the distressed-debt transaction discussed in Document A-40 was "to obtain a loss." Pet. App. 70a-71a. Petitioners fail even to acknowledge that evidence, which included the May 2, 2001, memorandum by Kerekes indicating that the distressed debt packages would be "useless for our purposes" if the securities were required to be revalued to fair market value (thereby eliminating the high basis required to generate a tax "loss"), and the fact that the "investments" were made shortly before the taxpayer intended to record a loss. *Id.* at 69a-71a. Against that evidentiary backdrop, the statement contained within Document A-40 itself—"I expect that Larry and I will provide Jay a list of losses to be triggered so we can make sure each client gets what he wants" (*id.* at 114a)—further indicated that petitioners and their tax practitioners were engaged in transactions based not on economic reality, but instead designed solely to create an artificial appearance of tax losses, and that the communications with tax practitioners at BDO Seidman were made in furtherance of that fraudulent conduct.

Even measured against the standard for the crime-fraud exception that petitioners urge upon the Court (Pet. 8)—"(i) identification of the specific crime-fraud alleged and (ii) evidence as to the essential elements" —petitioners cannot show that the evidence here was inadequate. The statement in Document A-40 on which the district court focused—which was analogous to a response of "how much do you want it to be?" to the question "how much is two p[illegible]s two?"—was evidence of a plan to submit fraudulent or false information on tax returns. See 26 U.S.C. 7206(2) ("Any person who * * * [w]illfully aids or assists in, or procures, counsels, or advises the preparation or presentation under * * * the internal revenue laws, of a return * * * which is fraudulent or is false as to any material matter" shall be guilty of a felony.); *United States* v. *Ragen*, 314 U.S. 513, 518-521 (1942) (characterization of payments as deductible "commissions," supported by falsified documents, supported conviction for tax fraud); *Bryan* v. *Commissioner*, 209 F.2d 822, 828 (5th Cir. 1954) (method of bookkeeping "designed to conceal the true facts concerning taxable income" warranted finding that false returns were filed with the intent to evade tax), cert. denied, 348 U.S. 912 (1955); *Drobny* v. *Commissioner*, 86 T.C. 1326, 1350 (1986) (fraud penalty upheld where economics of purported research partnership, including deductions greatly in excess of amount invested, made conclusion "inescapable" that taxpayer knew "that the funds for which he claimed deductions would not in fact be used for research"); 1 Ian M. Comisky et al., *Tax Fraud and Evasion* ¶ 8.02[3][f][iii], at 8-21 (6th ed. 2007) ("Fraudulent intent can be inferred from wrongful overstatement of a deduction or the claiming of an unallowable exemption or credit."). Because petitioners demon-

strate no error in the court of appeals' ruling upholding application of the crime-fraud exception to Document A-40, further review is not warranted.

c. Petitioners also ask this Court to "resolve the disagreements between the Courts of Appeal" concerning the level of proof required to support application of the crime-fraud exception (Pet. 27), and to establish a "simple, consistent crime-fraud rule" to apply in all circuits (Pet. 2). Petitioners are correct that the courts of appeals have articulated somewhat different verbal formulations of the evidentiary showing required to overcome a claim of privilege under the crime-fraud exception. See, *e.g.*, *In re Sealed Case*, 676 F.2d 793, 815 (D.C. Cir. 1982) (evidence that "if believed by a trier of fact, would establish the elements of some violation that was ongoing or about to be committed"); *In re Grand Jury Proceedings*, 87 F.3d 377, 381 (9th Cir.) ("reasonable cause to believe that the attorney's services were utilized . . . in furtherance of the ongoing unlawful scheme") (internal quotation marks and citation omitted), cert. denied, 519 U.S. 945 (1996); *In re Richard Roe, Inc.*, 68 F.3d at 40 ("probable cause to believe that a crime or fraud has been attempted or committed and that the communications were in furtherance thereof"); *Haines* v. *Liggett Group Inc.*, 975 F.2d 81, 95-96 (3d Cir. 1992) ("evidence which, if believed by the fact-finder, would be sufficient to support a finding that the elements of the crime-fraud exception were met"); *In re Grand Jury Investigation*, 842 F.2d 1223, 1226 (11th Cir. 1987) ("evidence that, if believed by a trier of fact, would establish the elements of some violation that was ongoing or about to be committed"); *In re International Sys. & Controls Corp. Sec. Litig.*, 693 F.2d 1235, 1242 (5th Cir. 1982) (relying on *Black's Law Dictionary* 1353 (4th ed. rev. 1968), "[evi-

dence] [s]uch as will suffice until contradicted and overcome by other evidence[;] . . . [a] case which has proceeded upon sufficient proof to that stage where it will support [a] finding if evidence to the contrary is disregarded"); *In re Antitrust Grand Jury*, 805 F.2d 155, 165-166 (6th Cir. 1986) (adopting Second Circuit's probable cause standard).

In *Zolin*, this Court declined to address "the quantum of proof necessary ultimately to establish the applicability of the crime-fraud exception." 491 U.S. at 563. And it is not necessary or appropriate for the Court to address that question in this case. Although the courts of appeals have acknowledged their differing articulations of the evidentiary standard under the crime-fraud exception, they also have recognized that those variations reflect differences in form rather than in substance. See *In re Grand Jury Proceedings*, 417 F.3d 18, 23 (1st Cir. 2005) ("The circuits—although divided on articulation and on some important practical details—all effectively allow piercing of the privilege on something less than a mathematical (more likely than not) probability that the client intended to use the attorney in furtherance of a crime or fraud. This is a compromise based on policy but so is the existence and measure of the privilege itself."), cert. denied, 546 U.S. 1088 (2006). See also *In re Antitrust Grand Jury*, 805 F.2d at 165-166 ("there are no practical differences between the probable cause standard and the *prima facie* standards formulated in the circuits"); *In re International Sys. & Controls Corp.*, 693 F.2d at 1242 n.11 (while another court used a "probable cause" standard rather than a "prima facie" case of crime or fraud, "[w]e think that while the court's phraseology is different, its approach was the same"). Because the application of the crime-

fraud exception is highly fact-based and committed in large part to the discretion of the district court, there is no actual conflict among the circuits—evidenced by differing results reached on comparable facts—that warrants this Court's intervention. Indeed, this Court has previously declined to address the question presented here, and there is no reason for a different result in this case. See *In re Grand Jury Proceedings*, 546 U.S. 1088 (2006) (No. 05-415); *Davis* v. *United States*, 510 U.S. 1176 (1994) (No. 93-900).

Nor is this case an appropriate vehicle for reaching the broader question of the evidentiary standard for the crime-fraud exception. The disclosure of only a single document is at issue and, as already discussed, the court of appeals' ruling upholding the application of the crime-fraud exception was supported by a detailed evidentiary record developed after a full opportunity for petitioners to contest application of the exception. This case also is in an interlocutory posture, which further weighs against granting review. See *VMI* v. *United States*, 508 U.S. 946 (1993) (Court generally awaits final judgment in lower courts before exercising certiorari jurisdiction).[11]

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[11] Petitioners invoke (Pet. 9-10) the asserted need to protect the "reputation and integrity" of attorneys and tax professionals as a reason to grant review, and they refer the Court (Pet. 7) to *Arthur Andersen LLP* v. *United States*, 544 U.S. 696 (2005). See also Pet. 22 (characterizing application of crime-fraud exception as "scarring someone for life"); Pet. 27 ("the incredibly corrosive crime-fraud scar"). Petitioners err in conflating the crime-fraud exception with a judicial determination of actual wrongdoing. The crime-fraud exception merely lifts a privilege that shields evidence pertinent to an investigation from judicial scrutiny. Application of the exception to a particular document does not constitute an adjudication that any individual is guilty of a crime or fraud. See *In re Grand Jury Sub-*

2. Petitioners also seek review of the court of appeals' holding that the statutory tax-shelter exception to the tax-practitioner privilege, 26 U.S.C. 7525(b) (2000), as it existed before 2004, was not limited to communications relating to corporate taxes (Pet. 27-38). That holding does not conflict with any decision of this Court or of any court of appeals, and review therefore is not warranted. Moreover, the issue is of limited and diminishing significance. Petitioners' claim relies entirely on the heading of the pertinent subsection as it existed before 2004. As petitioners acknowledge (Pet. 35-37), the language on which they rely no longer is part of the statute. Indeed, as amended in 2004, the provision eliminates any limitation to communications involving corporations, thus making clear that the tax-shelter exception applies across the board to all written communications involving covered tax shelters. This Court's review is not warranted on a narrow question of statutory interpretation concerning language that has been superseded by a subsequent amendment.

Petitioners also demonstrate no error in the court of appeals' ruling that the unambiguous language of the pre-2004 statute—which incorporated by reference a specific statutory definition of "tax shelter" not limited to corporate taxes—controls, even over an allegedly narrower statutory title or heading. This Court laid that question to rest many years ago:

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poenas, 144 F.3d 653, 661 n.3 (10th Cir.) (although crime-fraud exception applied, "[w]e by no means imply that Doe and Roe are guilty of any crimes or that they were, in fact, culpable in any way"), cert. denied, 525 U.S. 966 (1998); see also *United States* v. *Bisceglia*, 420 U.S. 141, 146 (1975) (the purpose of an IRS summons "is not to accuse, but to inquire"). Petitioners' exaggerated description of the impact of the crime-fraud exception does not support review.

> [H]eadings and titles are not meant to take the place of the detailed provisions of the text. Nor are they necessarily designed to be a reference guide or a synopsis. Where the text is complicated and prolific, headings and titles can do no more than indicate the provisions in a most general manner; to attempt to refer to each specific provision would often be ungainly as well as useless. As a result, matters in the text which deviate from those falling within the general pattern are frequently unreflected in the headings and titles. Factors of this type have led to the wise rule that the title of a statute and the heading of a section cannot limit the plain meaning of the text. For interpretative purposes, they are of use only when they shed light on some ambiguous word or phrase. They are but tools available for the resolution of a doubt. But they cannot undo or limit that which the text makes plain.

Brotherhood of R.R. Trainmen v. *Baltimore & Ohio R.R.*, 331 U.S. 519, 528-529 (1947) (citations omitted). See *Pennsylvania Dep't of Corr.* v. *Yeskey*, 524 U.S. 206, 212 (1998); *Almendarez-Torres* v. *United States*, 523 U.S. 224, 234 (1998). Petitioners' argument that this Court's jurisprudence in this area is limited to circumstances "when publishers injected titles never enacted by Congress" was not presented to the court of appeals and finds no support in the opinions of this Court.[12]

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[12] Petitioners also err in contending (Pet. 31-32) that the circuits are divided over the question of when a title contemporaneously enacted as part of the original statute may be consulted as an aid to interpreting statutory text. Although petitioners contend that the District of Columbia and Fifth Circuits endorse the consideration of a statutory title as an aid to statutory interpretation in the

And, contrary to petitioners' further assertions (Pet. 28-29, 35-38), the legislative history of the 2004 amendment of the statute, which eliminated the word "corporate" from the title of Section 7525(b) and substituted the word "person" for the word "corporation" in the statutory text, has no bearing on the proper interpretation of the predecessor statute. See *O'Gilvie* v. *United States*, 519 U.S. 79, 90 (1996) ("the view of a later Congress cannot control the interpretation of an earlier enacted statute"). Further review is unwarranted.

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absence of ambiguity in statutory text, both circuits have made clear that they follow this Court's clear jurisprudence in this area. See *United States* v. *Morganfield*, 501 F.3d 453, 459 (5th Cir. 2007) ("For interpretative purposes, [titles] are of use only when they shed light on some ambiguous word or phrase.") (quoting *Brotherhood of R.R. Trainmen*, 331 U.S. at 529), petition for cert. pending, No. 07-8647 (filed Jan. 4, 2008)); *Murphy Exploration & Prod. Co.* v. *United States Dep't of the Interior*, 252 F.3d 473, 481 (D.C. Cir. 2001) (same) (quoting *Yeskey*, 524 U.S. at 212)). Moreover, neither case cited by petitioners applies a different rule. In both *Hardin* v. *City Title & Escrow Co.*, 797 F.2d 1037 (D.C. Cir. 1986), and *House* v. *Commissioner*, 453 F.2d 982 (5th Cir. 1972), the courts consulted statutory subtitles to resolve disagreements between the parties about the meaning of statutory text, and it is fair to infer that both courts viewed the statutory text as sufficiently ambiguous to warrant resort to other indications of legislative intent. See *Hardin*, 797 F.2d at 1039-1040 (use of the word "jurisdiction" in the title of the statute at issue supported the conclusion that the time limitation in the text of the statute was also intended to be jurisdictional); *House*, 453 F.2d at 987 (where subheading of statute does not destroy clear meaning of body of statute, it is proper to consult heading "to come up with the statute's clear and total meaning"; the subheading of the statute at issue informed the meaning of the term "interest" in the statutory text).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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